IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. CR-00-S-422-S
ERIC ROBERT RUDOLPH,	:	

UNITED STATES' MEMORANDUM IN OPPOSITION TO RUDOLPH'S REQUEST FOR DISCOVERY OF MATERIALS RELATED TO THE SCIENTIFIC TESTING OF ATLANTA BOMBING EVIDENCE

Comes now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama, and Michael W. Whisonant, Assistant United States Attorney, and files this Memorandum in Opposition to Rudolph's Request for Discovery of Materials Related to the Scientific Testing of Atlanta Bombing Evidence as follows:

I. Background

In response to Defendant Rudolph's requests for Rule 16 discovery, the United States disclosed expert witnesses summaries of those experts who will testify as part of the United States' case-in-chief in the Birmingham trial. Stated simply, the government's expert witnesses will testify about scientific testing performed on three

categories of evidence: (1) evidence obtained at the scene of the January 29, 1998, bombing of the New Woman, All Women Health Clinic in Birmingham; (2) evidence seized in early 1998 from various locations associated with Rudolph located in and around Murphy, North Carolina; and (3) hand writing alleged to be that of Rudolph. In accordance with Federal Rule of Criminal Procedure 16, the United States produced reports summarizing the expected testimony of these expert witnesses, as well as the scientific conclusions underlying this testimony, on February 23, 2004.

On April 8, 2004, Rudolph filed a Motion for Discovery of Lab Bench Notes and Other Items, seeking additional discovery materials relating to the government's scientific evidence. Rudolph specifically states in his Motion that "[t]he present motion merely seeks the predicate materials upon which the [government's] experts' testimony is based." (Rudolph's Mot. at 21.) During a May 18, 2004, hearing on Rudolph's Motion, however, Rudolph's counsel extended his discovery request not only to materials related to the government's designated expert witnesses, but also to materials related to the scientific testing of evidence that will not be introduced in the government's case-in-chief in Birmingham.

Specifically, Rudolph seeks production of materials relating to the scientific testing of evidence obtained from the scene of three bombings in Atlanta. Pursuant to the liberal discovery policy employed in this case, the United States has already

produced to Rudolph exhaustive discovery related to the investigation of the Atlanta bombings. Included in the discovery are lab reports and photos of scientific testing of the Atlanta evidence. Defendant's present request, and this Memorandum, focus on specific categories of materials relating to scientific testing of the Atlanta evidence as identified in Rudolph's Motion, including "bench notes," correspondence, and other categories. With few exceptions, the government has agreed to produce the requested materials to the extent that they relate to the scientific testing of evidence to be introduced in the Birmingham case. The United States opposes the production of these materials to the extent that they relate to the scientific testing of Atlanta bombing evidence.

Rudolph is not charged in the present Indictment with any offenses relating to the three Atlanta bombings. Rudolph is charged with offenses relating to these bombings in a separate indictment returned in the Northern District of Georgia. As represented by the United States during the May 18, 2004, hearing, the United States does not intend to introduce any evidence relating to the Atlanta bombings during its case-in-chief or during the penalty phase of the Birmingham trial. Indeed, the government's expert witness summaries for the Birmingham trial do not contain a single reference to the Atlanta bombings.

The defense has failed to provide any justification for the government to produce the extensive discovery materials Rudolph has requested relating to the scientific testing of Atlanta bombing evidence. As summarized below, the requested materials do not fall within the scope of Rule 16 as it relates to expert witness discovery, which is the stated focus of Rudolph's Motion. To the extent that Rudolph premises his request on Brady or materiality arguments, the arguments fail because the defense has failed to show or explain how the Atlanta scientific evidence is material to Rudolph's defense.

II. Discussion

Rudolph's Motion offers four justifications for the production of the scientific testing materials: (1) the materials fall within the scope of Rule 16(a)(1)(G); (2) the materials fall within the scope of Federal Rule of Criminal Procedure 16(a)(1)(F); (3) the materials fall within the scope of Rule 16(a)(1)(E); and (4) the materials must be produced under Brady v. Maryland, 373 U.S. 83 (1963)..

First, Federal Rule of Criminal Procedure 16(a)(1)(G) provides that, for each expert witness to testify in the **government's case-in-chief**, the government must produce a summary describing "the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G). The United States has provided summaries to Rudolph that satisfy these requirements.

Rudolph has not shown–nor can he show–that the expert testimony to be presented in the Birmingham trial relies in any way on the scientific testing of the Atlanta evidence. Consequently, the requested materials do not fall within the scope of Rule 16(a)(1)(G).

Federal Rule of Criminal Procedure 16(a)(1)(E) requires the disclosure of materials and items if they are "material to preparing the defense" or they will be used in the **government's case-in-chief** at trial. Fed. R. Crim. P. 16(a)(1)(E). Rule 16(a)(1)(F) similarly requires the disclosure of the "results or reports of any ... scientific test or experiment" of an "item in the government's possession, custody, or control," so long as the item will be used in the **government's case-in-chief** at trial or is otherwise "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(F). As stated earlier, the United States does not intend to use materials related to the scientific testing of the Atlanta evidence in its case-in-chief. The government's obligation to produce these materials under either Rule 16(a)(1)(E) or Rule 16(a)(1)(F) therefore hinges solely upon an evaluation of whether they are "material to preparing the defense."

Under Eleventh Circuit law, "Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. There must be some indication that the pretrial disclosure of the disputed evidence would

have enabled the defendant to alter the quantum of proof in [her] favor." United States v. Holloway, 971 F.2d 675, 680 (11th Cir. 1992). "It is incumbent upon a defendant to make a prima facie showing of 'materiality' in order to obtain discovery" under Rule 16. United States v. Buckley, 586 F.2d 498, 506 (5th Cir. 1978). "A general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense. . . . Rather, the defendant must make a specific request for the item together with an explanation of how it will be 'helpful to the defense.'" United States v. Jordan, 316 F.3d 1215, 1250 (11th Cir. 2003).

Here, defendant has made no showing at all regarding the materiality of the requested discovery, thus falling far short of the prima facie showing required by Buckley. Rudolph himself states in his Motion for Discovery of Lab Bench Notes and Other Items that "[t]he present motion merely seeks the predicate materials upon which the [government's] experts' testimony is based." Rudolph's Mot. for Discovery of Lab Bench Notes and Other Items, at 21. In his Motion to Reconsider Trial Date, Rudolph further explains:

> Without the bench notes and other items requested in the discovery motion, the defense is unable to move forward on its examination of the government's expert testimony and its preparation of appropriate pretrial motions challenging the admissibility of the government's forensic evidence.

Rudolph's Mot. to Reconsider Trial Date, at 15. Rudolph thus seeks the requested materials in order to challenge the validity and reliability of the government's expert witness evidence. The government's expert witness testimony in this case, however, has nothing to do with the scientific testing of evidence obtained from the Atlanta bombings. Rudolph therefore has made no showing that the requested materials are material to the preparation of his defense, and the record otherwise lacks any factual basis for an order compelling production of these materials.

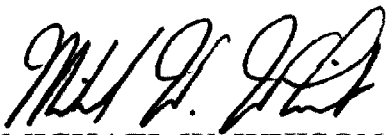
Finally, to the extent that Rudolph argues that the requested materials fall within the Brady doctrine, the United States is not able to respond to this argument for the same reasons as set forth in the United States' Response to Rudolph's Motion for Discovery of Lab Bench Notes and Other Items. Even assuming for the purposes of argument that Rudolph alleges that the scientific testing of the Atlanta evidence was methodologically flawed and therefore unreliable, Rudolph has not explained how such a showing would impact in any way the reliability of separate, distinct tests, performed during different time periods and, in some cases, different laboratories, on the Birmingham evidence.

For all these reasons, the United States opposes Rudolph's request for production of the materials identified in his Motion for Discovery of Lab Bench

Notes and Other Items, as these materials relate to scientific testing performed on the Atlanta bombing evidence, and the Court should deny Rudolph's request.

Respectfully submitted this the 27th day of May, 2004.

ALICE H. MARTIN
United States Attorney



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date, May 27, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record:

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